Hobgoblin of Little Minds No More: Justice Requires an IRS Duty of Consistency[1]

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[1] "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall." RALPH WALDO EMERSON, *Self-Reliance*, *in* ESSAYS: FIRST SERIES 58, 58 (1856), *available at* http://www.emersoncentral.com/selfreliance.htm.

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I. INTRODUCTION

In the United States, as in no other country, taxes have played a foundational role in the shape and tenor of our government. Often cited as a spark that ignited the American Revolution, Samuel Adams led the Boston Tea Party in response to Britain's Tea Act of 1773, which exempted the East India Company from a tax on tea without providing a similar exemption for colonial merchants.[2] It was a coup for tax consistency. After the Revolution, the perception that citizens of some states bore more of the war's cost than the citizens of other states proved crucial to organization of the Constitutional Convention.[3] The subsequent debate borne out in the Federalist Papers revealed a presupposition that the newly formed government would rule by fair consensus and not by fiat.[4] Time and again, our history has been shaped by taxpayers' demands. The country is not now so removed from the tax upheavals of 1776 and 1789 that the Service should be permitted to act with inconsistency simply because it is an arm of the government.

Our nation's birth notwithstanding, courts have insisted for more than three-quarters of a century that taxpayers owe a duty of consistency to the Service, but that the reverse is not true. In most instances, the Service may favor one taxpayer and discriminate against another, even when the two are virtually identical. This puzzling state of affairs resulted from courts' insistence that one taxpayer cannot escape his or her lawful burden simply by proving that the Service showed lenience to another taxpayer. When the Service breaks the rules for one taxpayer, others cannot complain when they are required to abide by them. In many instances, courts' decisions in consistency cases have turned on whether Congress gave the Service statutory permission to be lenient. Where lenience is within the Service's discretion, taxpayers can fight for consistent treatment. But where the Service employs rogue leniency, or exercises de facto discretion, a taxpayer who is prejudiced by the Service's action has no administrative or judicial recourse.

It should not be the case. Instead of resulting in a race to the bottom or a lowest common denominator system of taxation as courts have predicted, application of a broad duty of consistency to the Service would improve the

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[2]*See* 11 ENCYCLOPÆDIA BRITANNICA 556 (15th ed. 2002) (providing brief history of Tea Act of 1773), *available at* http://www.britannica.com/eb/article?tocId=9071501&query=boston20tea20party&ct=(2005).

[3]*See* RON CHERNOW, ALEXANDER HAMILTON 225–42 (2004) (discussing sequence of events leading to Constitutional Convention).

[4]For instance, *The Federalist* states:

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people.

THE FEDERALIST NO. 31, at 202 (Alexander Hamilton) (M. Walter Dunne ed., 1901).

quality of written advice while furthering fair administration of the revenue laws. As a result, I argue for application of such a duty. Section II examines the duty of consistency as it applies to taxpayers. Section III discusses the duty of consistency that currently applies to the Service and concludes that the duty provides inadequate protection. Section IV reviews arguments in favor of the taxpayer duty of consistency and demonstrates that these apply with equal force to the Service. Finally, this Article concludes that reasons for adopting a broad duty of consistency applicable to the Service outweigh the reasons against it. Application of a broad duty of consistency to the Service is both fair and necessary.

II. TAXPAYER DUTY OF CONSISTENCY

A. Origin of the Duty of Consistency

Although it has evolved over the years, the taxpayer duty of consistency began with the R. H. Stearns Company of Boston, Massachusetts.[5] The company's 1917 and 1918 income and profits tax returns were audited by the Service, and to facilitate a thorough and correct audit, the company signed two waivers of the statute of limitations.[6] The Commissioner signed one but forgot to sign the other, making it potentially invalid.[7] At the conclusion of his audit, the Commissioner made an assessment in excess of twenty thousand dollars, which the company paid.[8] Six years passed, and the company discovered the Commissioner's mistake.[9]

The company filed a claim for a refund of its 1918 taxes based on the faulty waiver.[10] During trial, testimony revealed that the company had asked the Service to suspend collection activity until the Service completed its audit of *all* of the company's open years.[11] As requested, the Service delivered the 1918 assessment at the end of the comprehensive audit.[12] The Supreme Court noted that the company's request for delayed collection of its 1918 taxes "reached forward into the future and prayed for the postponement of collection."[13] As a result, the company could not later change course and seek protection from the statute of limitations.[14] The Court held that "[t]he applicable principle is fundamental and unquestioned. He who prevents a thing from being done may not avail himself of the nonperformance which he has

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[5]*See* R.H. Stearns Co. v. United States, 291 U.S. 54 (1934).
[6]*Id.* at 56–57.
[7]*Id.* at 57.
[8]*Id.*
[9]*Id.* at 58.
[10]*Id.*
[11]*Id.* at 59–60.
[12]*Id.* at 60.
[13]*Id.* at 61.
[14]*Id.*

himself occasioned . . . . [N]o one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong."[15] And so the taxpayer duty of consistency was born.

B. Current Formulation of the Duty of Consistency

1. Three-Part Test

The same principle, in a more crystallized form, continues to apply to taxpayers today. The modern duty of consistency has three generally accepted prerequisites to application.[16] First, the taxpayer must have "made a representation or reported an item for tax purposes in one year."[17] Second, the Commissioner must have "acquiesced in or relied on" the taxpayer's representation for that year.[18] Finally, the taxpayer must desire to change its representation in a later year, after the statute of limitations has expired for the original year.[19] According to one court, "[a] taxpayer in this situation, innocent or otherwise, who has already had the advantage of a past alleged misstatement—such advantage now beyond recoupment—may not change his posture and, by claiming he should have properly paid more tax before, avoid the present levy."[20] In other words, if a case satisfies the three-pronged test, the Service can continue to rely on the taxpayer's original representation even though the representation was incorrect.

2. A Third Party May Bind the Taxpayer

The duty of consistency applies not only to statements made by the taxpayer but also to statements made by parties in financial privity to the taxpayer.[21] In *LeFever v. Commissioner*,[22] heirs sought to avoid an election made by the executor of an estate to make qualified use of farmland property.[23] The Tenth Circuit held that the heirs could not avoid the executor's election because the duty of consistency applied.[24] The court wrote that "the duty of consistency is usually understood to encompass both the taxpayer and parties

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[15] *Id.* at 61–62 (citations omitted).

[16] *See* Michael E. Baillif, *The Return Consistency Rule: A Proposal for Resolving the Substance-Form Debate*, 48 TAX LAW. 289, 291 (1995) (listing three elements of taxpayer duty of consistency); Steve R. Johnson, *The Taxpayer's Duty of Consistency*, 46 TAX L. REV. 537, 543, 549 (1992) (same).

[17] Beltzer v. United States, 495 F.2d 211, 212 (8th Cir. 1974).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *See id.* at 212–13; Hess v. United States, 537 F.2d 457, 464 (Ct. Cl. 1976).

[22] 100 F.3d 778 (10th Cir. 1996).

[23] *Id.* at 788.

[24] *Id.* at 789.

with sufficiently identical economic interests."[25] The heirs, the court concluded, had an economic interest in reducing the value of the estate at the time the estate tax return was filed.[26] As a result, the duty of consistency precluded them from adopting a different position after expiration of the statute of limitations on the estate's liability.[27] Other courts have reached similar conclusions.[28]

3. Taxpayer's Statement

According to the second prong of the duty of consistency, the Service must rely on the statement of a taxpayer or a party in privity. This requirement raises two lines of inquiry: what constitutes a statement, and what constitutes reliance by the Service. It is clear that the definition of "statement" must include oral representations and returns filed with the Service. But what about unreported income? In a Private Letter Ruling, the Service held that the failure to claim an item of income that the taxpayer had an affirmative duty to report was a representation for purposes of the duty of consistency.[29] The Service's conclusion seems like a self-serving way to defeat the statute of limitations, and at least one court has taken a contrary position. In *Ross v. Commissioner*,[30] the court wrote that "[a] mere failure to report income is not a representation that such income has in fact not been received."[31] The court likened the taxpayer's omission to an interpretation of law, and noted that "it seems settled that estoppel cannot be predicated upon a mere . . . silence resulting from an error of law."[32]

The *Ross* court's decision addresses only intentionally omitted income, leaving open the question of whether an inadvertent omission of income might be a statement for purposes of the duty of consistency. Because unintentional omission of income cannot be construed as a taxpayer's interpretation of the law, the *Ross* case will not govern, and the subject is open to debate. On one hand, rendering a statement is generally thought of as an affirmative act, while an unintentional omission is not an act at all. On the other hand, at least one court has held that the duty of consistency applies even if a taxpayer had no

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[25]*Id.* at 788.

[26]*Id.* at 788–89.

[27]*Id.* at 789.

[28]*See, e.g.*, Beltzer v. United States, 495 F.2d 211, 212 (8th Cir. 1974) (holding heirs to be bound by elder brother's choices on estate tax return); Hess v. United States, 537 F.2d 457, 464 (Ct. Cl. 1976) (holding heirs to be bound by statements made by executor of estate); Shanafelt v. United States, No. 96-1295-RE, 1997 WL 810907, at *4 (D. Or. Oct. 8, 1997) (holding shareholders to be bound by statements of closely held corporation); Cluck v. Comm'r, 105 T.C. 324, 335–36 (1995) (holding wife to be bound by husband's statements made in joint return).

[29]I.R.S. Priv. Ltr. Rul. 97-15-013 (Jan. 6, 1997).

[30]169 F.2d 483 (1st Cir. 1948).

[31]*Id.* at 496.

[32]*Id.*

knowledge of the previous misrepresentation.[33] In other words, "personal knowledge is not an element of the duty of consistency."[34] Under that view, it is possible that unintentional omission of income that later causes inconsistent reporting could be a statement for purposes of the duty even though the taxpayer has done no affirmative act.

4. Service's Knowledge

Courts have ruled that the Service cannot rely on a taxpayer's statement if the Service has reason to suspect the veracity of that statement.[35] Thus, the Service's knowledge is crucial. The *Ross* case put it simply, finding that "a party may not successfully claim reliance on a misrepresentation when he ought to have known the truth."[36] The *Ross* court looked to the *Brooklyn City Railroad Co.* case, in which the Commissioner's claim for estoppel failed because "the facts which he claimed to be misrepresented were available at all times on the books of the taxpayer."[37] The Eighth Circuit ruled likewise in *Helvering v. Williams*.[38] In that case, a taxpayer relinquished relevant documents to the Service during an audit, but the revenue agent assigned to the case did not notice the taxpayer's misrepresentation.[39] The court wrote that "if the taxpayer makes timely disclosure of all the material facts to the Commissioner or to his representative there can be no ground for an estoppel."[40] The court held that the Commissioner was not misled by the taxpayer's factual misrepresentation; therefore, the duty of consistency did not apply.[41] Finally, the Tax Court reached a similar conclusion in 1991 when it held that the Service had gathered sufficient information during the course of an audit to place it on notice that the taxpayer's prior representations were false.[42]

5. Three-Pronged Summary

Based on the paragraphs above, we can make three observations about the three prongs of the taxpayer duty of consistency. First, parties in privity to or with the same economic interests as a taxpayer can make statements that are binding on the taxpayer for purposes of applying the duty. Second, the Service believes that a taxpayer may make a statement by omission as well as by

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[33]*See* Baldwin v. Comm'r, 83 T.C.M. (CCH) 1915, 1928 (2002).
[34]*Id.*
[35]*E.g.*, Ross v. Comm'r, 169 F.2d 483, 495 (1st Cir. 1948).
[36]*Id.*
[37]*Id.* (discussing Helvaring v. Brooklyn City R.R. Co., 72 F.2d 274 (2d. Cir. 1934)).
[38]97 F.2d 810 (8th Cir. 1938).
[39]*Id.* at 812.
[40]*Id.*
[41]*Id.*
[42]*See* Erickson v. Comm'r, 61 T.C.M. (CCH) 2073, 2078 (1991).

commission. Third, the duty does not apply if the taxpayer provides the Service with information that is, in the first instance, sufficient for the Service to determine that the taxpayer has made a factual misrepresentation. These elements are important for understanding the operation of the duty of consistency and for crafting an equivalent applicable to the Service.

C. Application of the Duty of Consistency

The duty of consistency's three-pronged test is most effectively assessed in its operation. Because the duty of consistency can apply to any misrepresentation of fact by a taxpayer, cases relying on it are myriad.[43] The following four paragraphs develop the flavor of these cases and provide a representative sample of the doctrine's application. A theme predominates: a taxpayer cannot have his cake and eat it too.

First, in *Alamo National Bank of San Antonio v. Commissioner*,[44] taxpayer Lewis Alexander and his wife owned the San Antonio Coca-Cola Bottling Company, which acquired an exclusive franchise to bottle Coca-Cola in certain Texas counties.[45] The taxpayers dissolved the bottling company, and in computing their income upon liquidation, failed to include their exclusive franchise as an asset.[46] However, in a later year, when the taxpayers sold the business, they included the basis of the franchise in the basis of the business.[47] The Fifth Circuit Court of Appeals ruled that the taxpayers could not use the franchise basis.[48] The court wrote that "what is done in one tax year is sometimes projected into another where the same fact must govern. There being continuity, there ought to be consistency in treatment."[49] The court added that its ruling might be different if the taxpayer could correct its omission in the earlier year.[50] The court concluded that

> [i]t is no more right to allow a party to blow hot and cold as suits his interest in tax matters than in other relationships . . . . The law requires restoration as a condition of rescission, just as equity declares that one asking equitable aid must give effect to the equities of his opponent.[51]

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[43]*See* Baillif, *supra* note 16, at 290.
[44]95 F.2d 622 (5th Cir. 1938).
[45]*Id.* at 622.
[46]*Id.*
[47]*Id.*
[48]*Id.* at 623.
[49]*Id.*
[50]*Id.*
[51]*Id.*

The First Circuit reached a similar result in *Sterno Sales Corp. v. United States*.[52] In that case, Sterno, Inc. paid a sales commission to a sister organization, Sterno Sales Corporation, for its successful marketing of canned heat.[53] The Service found the commission excessive and disallowed Sterno, Inc.'s deduction for the excess amount.[54] Sterno Sales argued that it should be allowed to treat the disallowed amount as a dividend rather than compensation.[55] The court invoked the duty of consistency, holding that "a taxpayer must normally accept the tax consequences of the way in which he deliberately chooses to cast his transactions (although the Internal Revenue Service may not be bound by his choice)."[56] The court wrote that "[i]t would be quite intolerable to pyramid the existing complexities of tax law by a rule that the tax shall be that resulting from the form of transaction taxpayers have chosen or from any other form they might have chosen, whichever is less."[57] Finally, it concluded that "where, as here, it is the taxpayer alone who seeks to impugn his own transaction for his own tax benefit, the courts will not pay heed."[58]

More recent cases have followed suit. In *Shanafelt v. United States*,[59] the taxpayers' company paid compensation to the taxpayers in the guise of loans.[60] The Service discovered the taxpayers' arrangement and suggested they either prove the validity of the loans or instruct the company to write them off.[61] The company wrote off the loans, and as a result, the taxpayers recognized cancellation of indebtedness income.[62] Later, the taxpayers paid back a portion of the loans and attempted to repudiate the cancellation.[63] The court held that the duty of consistency prevented the taxpayers from changing their tax position *even though their financial position had changed*.[64] The court stressed that the taxpayers did not inform the Service of the repayment and that the Service relied on the taxpayers' characterization of the loans as forgiven.[65] As a result, the duty of consistency allowed the Service to continue to treat the loans as forgiven.[66]

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[52]345 F.2d 552 (Ct. Cl. 1965).
[53]*Id.* at 552.
[54]*Id.* at 553.
[55]*Id.*
[56]*Id.* at 554.
[57]*Id.* (internal quotation marks and citations omitted).
[58]*Id.* at 556 (internal quotation marks and citations omitted).
[59]No. 96-1295-RE, 1997 WL 810907, at *4 (D. Or. Oct. 8, 1997).
[60]*Id.* at *1.
[61]*Id.*
[62]*Id.* at *1–2.
[63]*Id.* at *2.
[64]*Id.* at *6.
[65]*Id.*
[66]*Id.*

Finally, the Tax Court adopted the duty of consistency in *Estate of Ashman v. Commissioner*.[67] In that case, a taxpayer received a distribution from her pension plan.[68] The taxpayer missed the deadline for rolling over a portion of the distribution into an IRA, but claimed on her income tax return that the deadline had been met.[69] She then rolled the delinquent portion into an annuity.[70] When the taxpayer later received payments from the annuity, she claimed that they were not includible in income because the annuity purchase price should have been previously taxed as a result of the delinquent rollover.[71] The court held that the duty of consistency prevented the taxpayer from profiting from her prior mistake in reporting.[72] The court wrote:

> [T]he duty of consistency not only reflects basic fairness, but also shows a proper regard for the administration of justice and the dignity of the law. The law should not be such a[n] idiot that it cannot prevent a taxpayer from changing the historical facts from year to year in order to escape a fair share of the burdens of maintaining our government.[73]

The court concluded that "once a taxpayer has transfigured the true facts, the power to change them back to their old form may well be lost. The taxpayer cannot reshape them at will."[74]

What wisdom can we distill from the *Alamo*, *Sterno*, *Shanafelt*, and *Ashman* decisions? Three observations come to mind. First, courts view taxation in a time continuum even though taxpayers must report their liability annually. Although the statute of limitations may interpose between the beginning and end of that continuum, it is a transparent, rather than an opaque, expanse. As a result, courts can see and act on basic issues of fairness even when the Service is barred from doing so by statute. Second, courts act in equity when applying the duty of consistency. As a result, the equities of the taxpayer's and the Service's positions, rather than their legal merits, are important. Therefore, a court can equitably apply the duty of consistency in favor of the Service even when a taxpayer would win as a matter of law. Finally, the duty of consistency is predicated on two separate notions of fairness. The first abhors the burden that tax evasion foists on other taxpayers. The second abhors a tax cheat simply on principle. As I will discuss in Section IV, these dual notions of fairness apply with equal force to the Service.

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[67] 231 F.3d 541, 544 (9th Cir. 2000).
[68] *Id.* at 541.
[69] *Id.* at 542.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 546.
[73] *Id.* at 544 (citation omitted).
[74] *Id.* at 546.

III. CONSISTENCY AS IT APPLIES TO THE SERVICE TODAY

A. The IRS Duty of Consistency

The duty of consistency currently applies to the Service in very limited circumstances, or not at all, depending on the jurisdiction in which the question arises.[75] In general, the duty applicable to the Service is a mirror image of that applicable to taxpayers. In *Alamo National Bank of San Antonio v. Commissioner*,[76] the Fifth Circuit described the reciprocity as follows:

> The taxpayer cannot say: "I was mistaken. The value was many times what I said it was. I therefore realized less gain on the last sale," without doing justice all around in correcting his mistake. *The reverse principal is also true if the Commissioner, in reviewing the return, should correct the first valuation and the taxpayer should acquiesce. The Commissioner could not repudiate his action when that value again became a determining factor.*[77]

Strangely, this straightforward principle has not been followed uniformly by the Service or by other courts. In a field service advice ("FSA") memorandum, the Service acknowledged that the duty of consistency applied to it, but limited the scope of that duty.[78] The Service stated that the duty is relevant only when (1) the Service makes a factual representation to the taxpayer in one tax year, (2) the taxpayer acquiesces in or relies on the representation, and (3) the Service changes the representation in a later year after expiration of the statute of limitations.[79] Because it is generally taxpayers, not the Service, who make representations of fact, the duty described by the FSA will rarely apply to the Service.

This result, no matter how limited, is still better than the retrograde motion recently exhibited by the Sixth Circuit, which held in an unpublished decision that "the duty of consistency only applies against the taxpayer."[80] In that case, the Service used a handwritten note to inform the taxpayer that the Service was closing its case.[81] When the Service reopened the case, the taxpayer argued, among other things, that the Service had violated the duty.[82]

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[75] *See generally* Johnson, *supra* note 16, at 537–49 (describing taxpayer's duty of consistency and different approaches currently used by courts).

[76] 95 F.2d 622 (5th Cir. 1938).

[77] *Id.* at 623 (emphasis added).

[78] I.R.S. Field Serv. Adv. Mem. 200026006, at 7 (Mar. 21, 2000).

[79] *Id.*

[80] Temple v. Comm'r, 62 F. App'x 605, 609 (6th Cir. 2003).

[81] *Id.* at 608.

[82] *Id.* at 608–09.

The court disagreed and wrote that the doctrine was "completely inapplicable" to the Service.[83]

In contrast, the court in *Conway Import Co. v. United States*[84] held that the Commissioner "owes a duty of consistency" to taxpayers not merely as to factual representations but also "in his interpretation of the regulations."[85] In that case, salesmen employed by the taxpayer, a wholesale food distributor, paid "gratuities" to purchasers employed by the taxpayer's customers.[86] The taxpayer deducted the expenses and kept records of them according to Internal Revenue Code section 6001.[87] At the time the taxpayer did so, no regulations required the taxpayer to keep records showing to whom the gratuities were paid.[88] Nonetheless, for the first time upon audit, the Service disallowed the taxpayer's deductions because it had not kept such records.[89] The court held that the Service owed the taxpayer a duty of consistent interpretation of the regulations until it notified the taxpayer that a new rule would apply in future years.[90] The court noted that doctrines of estoppel "should not be applied to prevent retroactive correction of a mistake of law," but that there are exceptions to the rule "based on the compelling equities of particular cases."[91] The court also held that the question was not one of "whether the Commissioner may notify a taxpayer that a previously acceptable standard of record-keeping will no longer be acceptable. At times it may be his duty to do so. However, any such action should be accomplished with a minimum amount of unfairness to the taxpayer."[92]

B. Other Consistency Doctrines Applicable to the Service

The notion that fundamental fairness requires the Service to consistently apply the revenue laws is not confined to the "duty of consistency" in its current formulation. Courts' decisions to employ or refuse consistency have come in a variety of shapes. For instance, the consistency ideal has also manifested itself in the *IBM* line of cases and in decisions on estoppel. The permissible scope of taxpayers' reliance on the Service's rulings, both published and private, is also relevant to the consistency inquiry. The following paragraphs explore courts' holdings on these issues with a view toward developing a broader duty of consistency applicable to the Service.

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[83] *Id.* at 609.

[84] 311 F. Supp. 5 (E.D.N.Y. 1969).

[85] *Id.* at 14.

[86] *Id.* at 8.

[87] *Id.* at 10. (citing I.R.C. § 6001 (1954) (amended 1976, 1978, 1982)).

[88] *Id.* at 11. Treasury Regulation section 1.6001-1 imposed this duty, but this regulation was not promulgated until 1959, two years after the taxpayer's alleged deficiency. *See id.* at 10.

[89] *Id.* at 12.

[90] *Id.* at 14.

[91] *Id.*

[92] *Id.* at 15.

1. Consistency under IBM

International Business Machines Corp. v. United States [93] ("*IBM*") has long been touted by taxpayers as the flagship for an IRS consistency rule. In that case, the Service granted a favorable ruling to Remington Rand but not to its competitor, IBM.[94] Eventually, after allowing hundreds of thousands of dollars to go untaxed, the Service revoked Remington Rand's ruling.[95] Because the revocation was prospective only, Remington Rand retained the benefit of a tax exemption that the Service denied to IBM.[96] IBM subsequently sued for a refund of the eleven-million-dollar excise tax that would have been relieved by a ruling comparable to Remington Rand's.[97]

The Court of Claims held that the Service had abused its discretion by treating similarly situated taxpayers differently.[98] The court wrote that the "leitmotif of [the Service's] defense is that taxpayers can never avoid liability for a proper tax by showing that others have been treated generously, leniently, or erroneously by the Internal Revenue Service."[99] It continued, "[t]hough our tax law often takes that stance, the rule is not universal."[100] More specifically, the court found that section 7805(b) of the Internal Revenue Code, which gave the Service permission to revoke rulings prospectively, imbued the Commissioner with an implied power not to collect taxes for a past period that otherwise would be required by law.[101] The court noted that use of this implied power required discretion and that the existence of such discretion mandated an implicit prohibition against its abuse.[102] The Service must "consider the totality of the circumstances surrounding the handing down of a ruling—including the comparative or differential effect on the other taxpayers in the same class."[103] The court wrote that "[e]quality of treatment is so dominant in our understanding of justice that discretion, where it is allowed a role, must pay the strictest heed."[104]

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[93] 343 F.2d 914 (Ct. Cl. 1965).

[94] *See id.* at 916–17. The court held that Remington Rand's Univac systems were not subject to an excise tax on business machines. *Id.* at 916. IBM requested a similar ruling for its Type 604 systems. *Id.* After a great deal of delay and additional expense to IBM, the Service refused to make a favorable ruling. *Id.* at 916–17.

[95] *Id.* at 916.

[96] *Id.*

[97] *Id.* at 921–23.

[98] *Id.* at 923.

[99] *Id.* at 919.

[100] *Id.* (citation omitted).

[101] *Id.* (citing I.R.C. § 7805(b) (1954) (amended 1976, 1996)).

[102] *Id.* at 920.

[103] *Id.*

[104] *Id.*

The consistency honeymoon soon ended. In *Bornstein v. United States*,[105] which was decided less than a month after *IBM*, the Court of Claims failed to apply the *IBM* rule in a case where similarly situated taxpayers had *not* sought a private letter ruling.[106] In that case, six corporations were created to own an apartment complex.[107] The corporations were, by and large, identical.[108] After the apartment complex was constructed, the corporations had excess mortgage funds that they wished to distribute to their shareholders.[109] One of the corporations obtained a private letter ruling from the Service stating that the distributions would be taxable as capital gains.[110] A Service employee who was not authorized to sign rulings informed the corporations' counsel that it would not be necessary for each corporation to obtain a ruling; rather, all of the corporations could rely on a single ruling.[111] Following the distributions, the Service allowed capital gains treatment to the shareholders of the corporation that sought the ruling and assessed deficiencies against the shareholders of the remaining corporations on the basis that those distributions were ordinary income.[112]

The *Bornstein* shareholders presented two arguments to the Court of Claims in favor of capital gains treatment. First, the shareholders argued that the Service was estopped by its employee's statement that all of the corporations could rely on a single ruling.[113] Second, the shareholders argued that the Service was estopped by the private letter ruling granted to their sister corporation.[114] The Court of Claims refuted both arguments. It held that

> [i]t is a settled principle of law that the United States is not bound by the unauthorized acts of it agents, that it is not estopped to assert the lack of authority as a defense, and that persons dealing with an agent of the government must take notice of the limitations of his authority.[115]

As a result, the shareholders could not rely on the Service employee's representation that there was no need to obtain individual rulings.[116] The court also held that the shareholders could not rely on the ruling issued to their sister

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[105]345 F.2d 558 (Ct. Cl. 1965).
[106]*Id.* at 565 n.2.
[107]*Id.* at 560.
[108]*Id.*
[109]*Id.*
[110]*Id.* at 561.
[111]*Id.*
[112]*Id.* at 561–62.
[113]*Id.* at 562.
[114]*Id.* at 562–63.
[115]*Id.* at 562.
[116]*Id.*

corporation.[117] The court noted that even if the shareholders had demonstrated detrimental reliance on the ruling, "the doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law."[118] Finally, the court distinguished *IBM* in a footnote, stating that it did not apply because, unlike IBM, the *Bornstein* shareholders had not sought their own private letter rulings.[119]

The court's limitation on *IBM* retains vitality. The Court of Claims seconded *Bornstein* with its holding in *Knetsch v. United States*,[120] which was decided two months later.[121] In addition, more recent decisions have limited *IBM* to its facts. In a 1997 case, the D.C. Circuit held that a pension fund could not demand the same treatment as similarly situated pension funds under *IBM* because *IBM* applied only to competitors.[122] Because pension funds do not compete with one another, the court held that relief was not available under *IBM*.[123] Likewise, in a 2004 case, the Federal Circuit held that a taxpayer who did not apply for a ruling was not entitled to relief from federal excise tax on large vehicles under *IBM* even though its vehicles were indistinguishable from those of its competitors who had received favorable rulings.[124] The Court of Federal Claims reached a similar conclusion in another 2004 case when one taxpayer requested a refund based on a letter ruling issued to another.[125]

These cases miss a crucial point. Despite *IBM*'s statute-based description of discretion, the Service can exercise and abuse discretion even in areas of the Internal Revenue Code that are textually nondiscretionary There are at least two reasons for such exercise and abuse. First, Congress and the Executive cannot (and should not) engage in detailed oversight of the entire operation of the Service. As a result, the Service necessarily has the power of intentional or inadvertent selective prosecution. Second, because the Service's resources are limited, it exercises de facto discretion over its administrative function by choosing which cases or areas of the law to pursue and how to pursue them. The combination of underwhelming oversight, budgetary restrictions, and overwhelming workload result in an implicit grant of real world, nonstatutory discretion that I will refer to as "de facto discretion." Courts should require the Service to exercise this de facto discretion with the same sensitivity that it

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[117] *Id.* at 561, 563; *see also id.* at 563 (referring to Internal Revenue ruling that distributions in question would be taxable as long-term capital gains in accordance with Internal Revenue Code section 117(b)).

[118] *Id.* at 563.

[119] *Id.* at 564 n.2 (discussing Int'l Bus. Mach. Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965)).

[120] 348 F.2d 932 (Ct. Cl. 1965).

[121] *Id.* at 940 n.14.

[122] *See* Stichting Pensioenfonds voor de Gezondheid, Geestelijke en Maatschappelijke Belangen v. United States, 129 F.3d 195, 200–01 (D.C. Cir. 1997).

[123] *Id.* at 201.

[124] *See* Fla. Power & Light Co. v. United States, 375 F.3d 1119, 1124–25 (Fed. Cir. 2004).

[125] *See* Atchison, Topeka & Santa Fe Ry. Co. v. United States, 61 Fed. Cl. 501, 505–07 (2004).

applies to its exercise of implicit discretion under section 7805 of the Code.[126] If courts recognized de facto discretion as a source of abuse, cases limiting the *IBM* rule to section 7805 would become obsolete, and the *IBM* case itself would support a broad-based application of the duty of consistency to the Service.

The revisionist *IBM* doctrine that I have just described enjoyed a brief and partial realization in *Computer Sciences Corp. v. United States*.[127] In that case, the Court of Federal Claims held that the Service abused its discretion when it allowed certain taxpayers to deduct contributions to qualified benefit plans but did not allow a similar deduction to similarly situated taxpayers.[128] The Service based its decision solely on whether the taxpayers had filed their returns before or after December 7, 1990.[129] Like *IBM*, *Computer Sciences Corp.* was based on section 7805 of the Code, but unlike *IBM*, it saddled the Service with a far-reaching duty to treat taxpayers consistently.[130] The court plainly stated, "[o]ne situation in which the Commissioner's actions may constitute an abuse of discretion is when similarly situated taxpayers are treated differently without a rational basis for the disparate treatment."[131] Looking to precedent, the court went even further, finding that the lawfulness of the Service's position "had no bearing upon the question of unreasonable discrimination,"[132] and that "case law makes clear that discrimination based solely upon an arbitrary factor . . . is sufficient to conclude that the Service had abused its discretion."[133] In other words, while the *IBM* court was only willing to find an abuse of the Service's discretion under section 7805,[134] the *Computer Sciences Corp.* court was willing to find an abuse of discretion in any instance where the Service treated similarly situated taxpayers differently.[135]

History repeated itself, and the triumph was short-lived. Less than two months later, the Court of Federal Claims disavowed any "exceedingly broad" interpretation of the *Computer Sciences Corp.* decision in a lengthy footnote to the *Vons* case.[136] The court noted that a broad interpretation of the opinion

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[126]I.R.C. § 7805 (2000).

[127]50 Fed. Cl. 388 (2001).

[128]*Id.* at 396.

[129]*Id.*

[130]*Id.* at 392–94.

[131]*Id.* at 393.

[132]*Id.* at 395.

[133]*Id.* at 394.

[134]*See id.* at 393–94 (citing Int'l Bus. Mach. Corp. v. United States, 343 F.2d 914, 919 (Ct. Cl. 1965)).

[135]*See id.* at 393–94, 397–98.

[136]*See* Vons Companies, Inc. v. United States, 51 Fed. Cl. 1, 11 n.10 (2001) (stating that *IBM* decision is limited by *Bornstein*'s second footnote in so far as it only applies where "(i) one or more taxpayers in direct economic competition have each applied for a ruling and only one as received a favorable ruling; and (ii) the taxpayer denied the favorable ruling is arguing that the Commissioner abused his discretion . . . by failing to apply a new legal position only prospectively").

would be an "unwarranted extension" of *IBM*.[137] The court then criticized *Computer Sciences Corp.* for "separat[ing] *IBM* from its important factual moorings" and for ignoring the *Bornstein* decision's limiting effect.[138] The court wrote:

> In general, notwithstanding Justice Frankfurter's oft-quoted statement that "[t]he Commissioner cannot tax one and not tax another without some rational basis for the difference," the manifest weight of precedent rejects a "least common denominator" notion of federal taxation, in which the law that the Congress actually enacts can be short-circuited and disregarded any time the IRS has afforded a single taxpayer or even a group of taxpayers treatment more favorable than the law provides.[139]

The *Vons* decision was a setback for taxpayers seeking consistent treatment in the Court of Federal Claims. Worse, the *Vons* decision and others like it are internally inconsistent. By noting that the Commissioner was able to treat taxpayers more favorably than the law provides in forums other than private letter rulings, the *Vons* court accidentally acknowledged that the Commissioner's discretion extends beyond the implicit grant contained in section 7805 of the Code. This unspoken acknowledgement undercuts the limitation placed on *IBM* by the *Bornstein* court. Unfortunately, the *Vons* court's failure to see the contradiction left the Commissioner's ability to rule by fiat outside of the private letter ruling context undisturbed.

The Second Circuit made a more promising decision in *Sirbo Holdings, Inc. v. Commissioner*.[140] In that case, the Service prosecuted an issue against one taxpayer that it had conceded in the case of another taxpayer just two months earlier.[141] Judge Friendly wrote that "the Commissioner has a duty of consistency toward similarly-situated taxpayers; he cannot properly concede capital gains treatment in one case and, without adequate explanation, dispute it in another having seemingly identical facts which is pending at the same time."[142] The court added: "That the Commissioner's seeming inconsistency may have arisen from the right hand's ignorance of the posture of the left is little solace to taxpayers who are entitled to a non-discriminatory administration of the tax laws."[143] When, upon reconsideration in the Tax Court, the Service admitted that its earlier concession had been a mistake, the court relented, noting that the Service must be allowed to correct mistakes of

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[137] *Id.*
[138] *Id.*
[139] *Id.* (quoting United States v. Kaiser, 363 U.S. 299, 308 (1960)).
[140] 476 F.2d 981 (2d Cir. 1973).
[141] *Id.* at 987.
[142] *Id.*
[143] *Id.*

law.[144] The Second Circuit then fell into line and held that the error in one case could not be perpetuated where the Service admitted its error and renounced its earlier position.[145] As the *Sirbo* cases demonstrated, the *IBM* line of cases keeps the idea of consistency fresh in the minds of taxpayers and judges, but it has not yet proved reliable as a basis for application of a broader duty of consistency to the Service.

2. The Limited Reach of Equitable Estoppel

Like the *IBM* doctrine, equitable estoppel is a consistency weapon of limited range in tax cases because "it is well settled that the Government may not be estopped on the same terms as any other litigant."[146] In order to prevail on an estoppel claim against the Service, a taxpayer must satisfy all of the traditional estoppel elements[147] *and* a bonus malfeasance element. Even then, the result may depend on the circuit in which the case is tried.[148] While the Supreme Court has not flatly forbidden estoppel claims against the Service, it has not expressly allowed them either.[149]

Although the requirements vary among circuits, in order to satisfy traditional estoppel elements, a taxpayer generally must prove that (1) the Service knew all of the facts relevant to the case, (2) the Service intended or the taxpayer reasonably believed that the Service intended the taxpayer to act based on the Service's conduct, (3) the taxpayer was ignorant of the true facts, and (4) the taxpayer detrimentally relied on the Service's conduct.[150] Then, in order to satisfy the additional element, the taxpayer must show that the Service affirmatively engaged in misconduct amounting to more than mere negligence.[151] In other words, demonstrating detrimental reliance on the

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[144]*See* Sirbo Holdings, Inc. v. Comm'r, 509 F.2d 1220, 1222 (2d Cir. 1975).

[145]*Id.*

[146]Heckler v. Cmty. Health Servs., 467 U.S. 51, 60 (1984).

[147]*See* Lyng v. Payne, 476 U.S. 926, 935 (1986) (finding that if government is subject to estoppel, private party cannot prevail without at least demonstrating traditional elements of estoppel).

[148]*See* MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE § 1.06[4], at 1-75 n.243 (rev. 2d ed. 2005) (explaining that Ninth Circuit applies estoppel against United States but other circuits do not always agree, such as Eleventh Circuit, which uses three-part test).

[149]*See* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 423 (1990) ("We leave for another day whether an estoppel claim could ever succeed against the Government.").

[150]Ann K. Wooster, Annotation, *Taxpayer's Assertion of Equitable Estoppel against IRS Based on Representations of IRS or Non-IRS Employees*, 176 A.L.R. FED. 33, 51 (2002).

[151]*See* Office of Pers. Mgmt., 496 U.S. at 429–30 (discussing requirement of Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346, 1402, 2401–02, 2411–12, 2671–80 (2000), that government misconduct rise above negligence).

Service's statements is not enough.[152] In addition, the doctrine does not apply to mistakes of law.[153]

The added burden of proving malfeasance makes equitable estoppel claims against the Service difficult for taxpayers to prosecute. In addition, the field of cases to which the doctrine of estoppel applies is narrow because mistakes of law are excluded from the doctrine's operation. The result, that a taxpayer cannot rely on statements of law made by employees of the agency charged with administering the law, seems absurd. Nonetheless, the Supreme Court has worried that acceptance of estoppel claims against the Service could have "pernicious effects," stating that "[i]t ignores reality to expect that the Government will be able to 'secure perfect performance from its hundreds of thousands of employees scattered throughout the continent.'"[154] Allowing estoppel claims, the Court has reasoned, "would only invite endless litigation," and would impose "an unpredictable drain on the public fisc."[155] According to the Court, the threat of such claims would not cause the government to give better advice, but rather, less advice.[156] In light of the Court's position, one might legitimately ask, if these barriers prohibit a taxpayer from relying on information given directly to him by the Service, how much less can that person rely on information given to another taxpayer? As I will discuss in Section IV, the specters of increased litigation and decreased advice, if they are legitimate concerns, arise not only in the context of estoppel but also in the context of a broad duty of consistency when applied to the Service. Nonetheless, they do not outweigh the need for consistent application of the revenue laws.

3. Taxpayer Reliance on the Service's Rulings

A third source of the consistency doctrine arises from taxpayer reliance on the Service's rulings. The equitable estoppel cases described above make it clear that a taxpayer can almost never rely on the Service's oral or informal statements. The result is different for some, but not all, of the Service's written products. Taxpayers can generally demand consistent treatment based on revenue rulings, subject to the Service's ability to correct a mistake of law.[157] In contrast, private letter rulings may only be relied on by the taxpayers to

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[152]*See* Dickman v. Comm'r, 465 U.S. 330, 343 (1984) (holding that Commissioner's change in position was permissible even if taxpayer detrimentally relied on former articulation).

[153]*See* Auto. Club of Mich. v. Comm'r, 353 U.S. 180, 183–84 (1957) (holding that estoppel would not prevent Commissioner from retroactively revoking ruling erroneously granted).

[154]*Office of Pers. Mgmt.*, 496 U.S. at 433 (quoting Hansen v. Harris, 619 F.2d 942, 954 (2d. Cir. 1980) (Friendly, J., dissenting)).

[155]*Id.*

[156]*Id.*

[157]*See* Treas. Regs. § 601.702(d) (as amended in 1983).

whom they are directed.[158] A taxpayer's ability to rely on written rulings is crucial to the application of a broad duty of consistency to the Service because the Service's pronouncements are predominantly delivered via the written word. The following paragraphs describe the extent to which reliance on written rulings is permitted by courts and the Service.

(a) Revenue Rulings and Revenue Procedures

Treasury Regulation section 601.601(d) states that a revenue ruling is "an official interpretation by the Service," the purposes of which are "to promote correct and uniform application of the tax laws by Internal Revenue Service employees and to assist taxpayers in attaining maximum voluntary compliance."[159] Revenue rulings are "directly responsive to and limited in scope by the pivotal facts stated in the revenue ruling."[160] Their use by courts has been relatively uncontroversial until the past decade.[161] Generally, courts agreed that revenue rulings were not binding.[162] For instance, in 1982, the Ninth Circuit found revenue rulings useful for interpretive purposes but held that "they are not conclusive statements of the law."[163] The court also wrote that "[a] revenue ruling that conflicts with the revenue laws must be ignored."[164] This position echoed the general consensus among courts until the beginning of the 1990s.

Since then, courts have treated revenue rulings with greater deference due to the deliberative nature of their creation.[165] Professor Linda Galler has noted that revenue rulings are unique among Service pronouncements because they share characteristics common to both regulations, which receive deference from courts, and private letter rulings, which do not.[166] She has written:

> Confusion as to judicial weight is prevalent only with respect to revenue rulings because they are hybrids. Like regulations, revenue rulings apply generically rather than to a single recipient, as do letter rulings. Revenue ruling issuance procedures, however, more closely resemble those of letter rulings, which are released without the sort of public participation that is mandated as to regulations.[167]

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[158]*See* I.R.C. § 6110 (2000).

[159]Treas. Regs. § 601.601(d)(2)(i)(a), (d)(2)(iii) (as amended in 1983).

[160]*Id.* § 601.601(d)(2)(v)(a).

[161]*See* Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1056 (1995).

[162]*Id.*

[163]Propstra v. United States, 680 F.2d 1248, 1256 (9th Cir. 1982).

[164]*Id.*

[165]*See* Aeroquip-Vickers, Inc. v. Comm'r, 347 F.3d 173, 180 (6th Cir. 2003) (noting that revenue rulings are agency interpretations entitled to respect if persuasive, and that Second and Ninth Circuits have afforded revenue rulings "great deference").

[166]*See* Galler, *supra* note 161, at 1042.

[167]*Id.*

Based on this description, the logical conclusion is that courts should give revenue rulings less deference than regulations, but more deference than private letter rulings. More deference should, in turn, result in greater consistency.

Today, most courts treat revenue rulings with some form of deference, and only the Tax Court continues to treat the rulings as though they were merely the arguments of a litigant.[168] A recent Sixth Circuit case, *Aeroquip-Vickers, Inc. v. Commissioner*,[169] gave a well-supported explanation of courts' deference to revenue rulings.[170] When urged by a taxpayer to disregard a revenue ruling, the Sixth Circuit looked to the Supreme Court's decision in *Christensen v. Harris County*,[171] which held that agency interpretations such as opinion letters, agency manuals, and enforcement guidelines are entitled to deference only to the extent that such interpretations have the power to persuade a court.[172] The Sixth Circuit reasoned that revenue rulings were similar to the interpretations discussed in *Christensen* because, when drafting them, the Service does not "invoke its authority to make rules with the force of law."[173] The court then noted the Supreme Court's additional holding that although agency opinion letters are not entitled to *Chevron* deference, they "may merit some deference whatever its form" based on an agency's specialization and its access to information.[174] Finally, the Sixth Circuit looked to the Supreme Court's ruling in *United States v. Cleveland Indians Baseball Co.*,[175] which held that revenue rulings reflect the Service's long-standing interpretation of its own regulations and are entitled to "substantial judicial deference."[176] The Sixth Circuit concluded that the revenue ruling in the *Aeroquip-Vickers* case was a plausible interpretation of the law and, as a result, the court afforded deference to the ruling.[177]

For a taxpayer who seeks to contravene a revenue ruling, the circuit courts' deference, however limited, might be troubling news. In contrast, the news is good for a taxpayer who seeks to hold the Service to a duty of

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[168]*See* Estate of McLendon v. Comm'r, 135 F.3d 1017, 1023 (5th Cir. 1998) ("Whereas virtually every circuit recognizes some form of deference, the Tax Court stands firm in its own position that revenue rulings are nothing more than the legal contentions of a frequent litigant." (citations omitted)). *But see* Kosow v. Comm'r, 45 F.3d 1524, 1529 n.4 (11th Cir. 1995) ("An IRS ruling is not the product of notice and comment procedures, but is merely an opinion of an IRS attorney. While taxpayers may assert their holdings as a shield, they do not have the effect of law and are not binding on the courts." (citations omitted)).

[169]347 F.3d 173 (6th Cir. 2003).

[170]*Id.* at 180.

[171]529 U.S. 576 (2000).

[172]*Aeroquip-Vickers*, 347 F.3d at 180 (citing *Christensen*, 529 U.S. at 587).

[173]*Id.*

[174]*Id.* (citing United States v. Mead Corp., 533 U.S. 218, 234 (2001)).

[175]532 U.S. 200 (2001).

[176]*Aeroquip-Vickers*, 347 F.3d at 180 (citing *Cleveland Indians Baseball*, 532 U.S. at 220).

[177]*Id.* at 182 (referring to Rev. Rul. 82-20, 1982-1 C.B. 6).

consistency based on its written rulings. For instance, in *Estate of McLendon*,[178] the Service sought to disavow application of a revenue ruling where the ruling would have produced an unusually favorable result for the taxpayer.[179] The court, after discussing the level of deference due revenue rulings, wrote that "[t]he Commissioner cannot eat his cake and have it too."[180] The court held that the taxpayer was entitled to rely on the legal standard implied by the revenue ruling and found that the taxpayer had, in fact, done so.[181] The court noted that the Service had specifically approved the ruling and, as a result, "could not be heard to fault a taxpayer for taking advantage of the tax minimization opportunities inherent therein."[182]

The Service itself seems to agree with the *McLendon* court's view. In Revenue Procedure 89-14, it stated that revenue rulings "are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose."[183] In addition, the revenue procedure states that "[t]axpayers generally may rely upon revenue rulings and revenue procedures published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published revenue ruling or revenue procedure to the facts of their particular cases."[184] This statement is echoed in the regulations.[185] Although the question might arise as to how much deference a court must give the revenue procedure's statements regarding revenue rulings, in general, it seems as though a taxpayer can expect consistent treatment based on revenue rulings.

As a side note, it is worth mentioning revenue procedures. According to the regulations, a revenue procedure is "a statement of procedure that affects the rights and duties of taxpayers."[186] Revenue procedures are issued for the same purposes as revenue rulings: to promote uniform application of the laws by the Service and to maximize voluntary compliance by taxpayers.[187] In contrast to the regulations applicable to revenue rulings, the regulations applicable to revenue procedures do not provide for taxpayer reliance. In addition, a number of courts have held that revenue procedures are directory rather than mandatory,[188] which could cut either for or against the taxpayer depending upon whether the taxpayer seeks to disavow or demand treatment consistent with a published procedure. Although a full exploration of the issue

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[178]135 F.3d 1017 (5th Cir. 1998).

[179]*Id.* at 1024–25 (referring to Rev. Rul. 80-80, 1980-1 C.B. 194).

[180]*Id.* at 1024 n.13.

[181]*Id.* at 1025.

[182]*Id.*

[183]Rev. Proc. 89-14, 1989-1 C.B. 814, § 7.01(4).

[184]*Id.* § 7.01(5).

[185]*See* Treas. Reg. § 601.601(d)(2)(v)(e) (as amended in 1983).

[186]*Id.* § 601.601(d)(2)(i)(b).

[187]*See id.* § 601.601(d)(2)(iii).

[188]*See* Eli Lilly & Co. v. Comm'r, 856 F.2d 855, 865 (7th Cir. 1988) (listing cases so holding).

is beyond the scope of this Article, at least one court has required the Service follow a revenue procedure where the procedure was the only clear indication of the Service's position on a particular transaction.[189] There seems to be hope, then, that revenue procedures could be used in addition to revenue rulings as a basis for requiring consistent treatment of similarly situated taxpayers.

(b) Private Letter Rulings and Technical Advice Memoranda

The most voluminous source of Service guidance is its body of private letter rulings. Although the Service has some obligation to act in a manner consistent with the guidance provided by it in revenue rulings and revenue procedures, the same is generally not true for private letter rulings, which are provided for the benefit of a single taxpayer. The Internal Revenue Code specifically provides that private letter rulings may not be used as precedent.[190] Regardless, there are two important exceptions to the general rule of nonreliance. The first, discussed above, is found in *IBM*.[191] Second, some courts, including the Supreme Court, have looked to private letter rulings for evidence of administrative interpretation.

The Supreme Court first addressed the use of private letter rulings in *Hanover Bank v. Commissioner*.[192] In that case, the Court was called on to interpret section 125 of the Internal Revenue Code.[193] The Court noted that, after a period of consistent interpretation, the Commissioner was "reversing the position he had previously and uniformly adhered to in a series of private [letter] rulings."[194] After reaching a tentative conclusion based on the statute's language and legislative history, the Court turned to the private letter rulings as "[p]ersuasive evidence" that its interpretation was correct.[195] The Court wrote that, "although the petitioners are not entitled to rely upon unpublished private rulings which were not issued specifically to them, such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws."[196]

Hanover was decided prior to Congress's enactment of section 6110(k)(3) of the Code. That section, which was adopted in 1976, states that the Service's written rulings may not be used or cited as precedent.[197] Commentators have

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[189] *E.g.*, *id.* at 865.

[190] *See* I.R.C. § 6110(k)(3) (2000).

[191] *See* Int'l Bus. Mach. Corp. v. United States, 343 F.2d 914, 915 (Ct. Cl. 1965); *see also infra* Part III.B.1 (discussing consistency under *IBM*).

[192] 369 U.S. 672, 686–87 (1962).

[193] *See id.* at 686 (citing I.R.C. § 125 (2000)).

[194] *Id.* at 687 n.21.

[195] *Id.* at 686.

[196] *Id.*

[197] *See* I.R.C. § 6110(k)(3) (2000).

noted that the statute's language is less than clear.[198] Specifically, the meaning of "precedent" is opaque.[199] The section's legislative history indicates that Congress meant to prevent one taxpayer from relying on a ruling issued to another.[200] The rule as it relates to people, then, is not difficult to apply.

How the rule affects the Service and courts is less obvious. The IRS Manual forbids employees from relying on, using, or citing letter rulings as precedent; however, the Service maintains prior rulings in a reference file and relies on them when dealing with similar requests.[201] In addition, when an employee finds that a prior ruling position should be reversed or modified, the employee may issue a new ruling only with the blessing of counsel.[202] These protocols demonstrate that the Service generally values consistent treatment of taxpayers and relies on prior letter rulings as a means of achieving it.[203] The same luxury is not afforded to taxpayers by Congress or courts, although some courts have circumvented the rule in recent years, as discussed below.

(c) The Policy of Section 6110 and Consistency

Prior to the enactment of section 6110 of the Code,[204] private letter rulings were unpublished. By preventing taxpayers from demanding consistent treatment based on private letter rulings, Congress sought to stem the dampening effect that publication might have on the ruling process.[205] In other words, if the Service were bound by private letter rulings placed into publication, it would have to subject them to the same scrutiny applied to revenue rulings and revenue procedures. Congress worried that additional scrutiny would slow the ruling process, making it less accessible to taxpayers.[206] In effect, Congress traded reliability for a limited form of efficiency. In a faster ruling process, Service employees would be more likely to make interpretive errors; however, deadweight loss to taxpayers resulting from time lag would be minimized.

This reasoning—that a speedier ruling process promotes efficient transactions by limiting lag time—results in an acceptable compromise. Although it accounts only for efficiency of the taxpayer seeking the ruling and fails to consider the dozens of other taxpayers who might be similarly situated,

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[198]*See* Galler, *supra* note 161, at 1057; Lawrence Zelenak, *Should Courts Require the Internal Revenue Service to Be Consistent?*, 40 TAX L. REV. 411, 439–43 (1985).

[199]Galler, *supra* note 161, at 1057.

[200]*Id.*

[201]*Id.* at 1057–58 (citing Internal Revenue Service Manual 153 (1992)).

[202]*Id.* at 1058.

[203]*See* Zelenak, *supra* note 198, at 439 (referencing rulings that were important tools in Service's pursuit of uniformity and correctness).

[204]Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended at I.R.C. § 6110 (2000)).

[205]*See* Zelenak, *supra* note 198, at 436–37 (citing S. REP. NO. 94-938, at 311 (1976)).

[206]*Id.* (citing S. REP. NO. 94-938, at 311).

the ill effect of its narrow scope is offset by its dissemination of knowledge. The most efficient scenario possible is one that allows additional taxpayers to demand consistent treatment based on the first taxpayer's ruling. Of course, section 6110 of the Code prevents this scenario. If we assume, as Congress did, that a faster ruling process increases the likelihood of interpretive errors, allowing additional taxpayers to rely on the first taxpayer's ruling would result in an inaccurate measure of revenue, which could favor either the government or the taxpayers, but which, in either case, would be a distortion of congressional intent. Therefore, Congress's true choice in enacting section 6110(k)(3) of the Code was between fairness and efficiency for taxpayers and proper administration of the revenue laws. Rather than favor one over the other, Congress split the bill by mandating publication of rulings while forbidding taxpayer reliance on those rulings. This choice represents a practical compromise that neither supports nor undercuts application of a broad duty of consistency to the Service. As one commentator noted, if the Service is permitted to use private letter rulings for consistency purposes, courts should be able to do the same even though the taxpayer cannot.[207]

(d) Section 6110 Is Compatible with Consistency

Enactment of section 6110(k)(3) actually had little effect on the Supreme Court's treatment of private letter rulings. In *Rowan Companies, Inc. v. United States*,[208] a post-enactment ruling, the Supreme Court was called on to determine the validity of a regulation, and it looked to private letter rulings for assistance.[209] The taxpayer in the case owned and operated offshore oil rigs and had not included room and board in its employees' wages for purposes of FICA[210] and FUTA,[211] despite a regulation requiring it to do so.[212] The taxpayer claimed that the regulation's broad description of wages was invalid.[213] The Service countered that the regulation had Congress's imprimatur because the underlying statute had been adopted without legislative amendment of the regulatory definition.[214] As part of its argument, the Service alleged that its interpretation of the word "wages" had been consistent for a number of years.[215] The Court disagreed, based on its analysis of relevant

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[207] *See id.* at 443–47 (discussing cases in which courts have considered private letter rulings).

[208] 452 U.S. 247 (1981).

[209] *See id.* at 261–62, 262 n.17.

[210] I.R.C. §§ 3101–28 (2000).

[211] *Id.* §§ 3301–11.

[212] *Rowan Companies*, 452 U.S. at 249 (citing I.R.C. § 3402(a) (2000)).

[213] *Id.* at 251.

[214] *Id.* at 258.

[215] *Id.*

private letter rulings.[216] The Court noted that although the rulings had no *precedential* value as a result of section 6110(k)(3), they had *evidentiary* value with regard to the Service's actions.[217] Because the rulings were inconsistent both before and after Congress considered the FICA and FUTA statutes, the Court found that Congress could not have approved the Service's interpretation.[218]

The Supreme Court's use of private letter rulings in *Rowan* differed from its use of them in *Hanover*. In *Rowan*, the Service claimed consistent administration as proof of regulatory validity, which put the content of its rulings at issue.[219] In *Hanover*, by contrast, the Court itself put the content of the Service's rulings at issue by relying on them to support its statutory interpretation.[220] Note, however, that although *Hanover* was decided prior to the enactment of section 6110(k)(3), the Court stated that the taxpayer could not rely on the rulings.[221] As a result, the intervening enactment of section 6110(k)(3) and the Court's subsequent decision in *Rowan* should not foreclose *Hanover*-style use.

In fact, the Court's most recent foray into the status of the Service's informal rulings confirms that the door is still open.[222] In *Hill*, the Court was asked to decide a technical question about taxpayers' bases in mineral interests.[223] As part of their argument, the taxpayers cited a technical advice memorandum, which the Court considered in a footnote.[224] After a summary recitation of section 6110(k)(3), the Court addressed the substance of the memorandum, noting that it described a situation "entirely different" from the one presented in *Hill*.[225] Although the Court eventually ruled against the taxpayers, its noticeable effort to distinguish a technical advice memorandum in the taxpayers' favor indicates that the Court continues to find the Service's informal rulings educational despite section 6110 of the Code.

(e) Courts of Appeals Take the Extra Step

Courts of appeals have, to some extent, taken the high court's cue. As a result, private letter rulings might serve as the basis of a consistency claim in

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[216]*Id.* at 261–62, 262 n.17 (citing I.R.S. Priv. Ltr. Rul. 6507023460A (Jul. 2, 1965); I.R.S. Priv. Ltr. Rul. 5710044200A (Oct. 4, 1957); I.R.S. Priv. Ltr. Rul. 5501244180A (Jan. 24, 1955); I.R.S. Priv. Ltr. Rul. 5403042970A (Mar. 4, 1954); I.R.S. Priv. Ltr. Rul. 5401062910A (Jan. 6, 1954)).

[217]*Id.* (citing I.R.C. § 6110(k)(3) (2000)).

[218]*Id.*

[219]*Id.*

[220]Hanover Bank v. Comm'r, 369 U.S. 672, 686–87 (1962).

[221]*Id.* at 686.

[222]*See* United States v. Hill, 506 U.S. 546, 564 n.12 (1993) (discussing effect of private letter ruling on pending case).

[223]*Id.* at 548.

[224]*See id.* at 564 n.12 (considering I.R.S. Tech. Adv. Mem. 83-14-011 (Dec. 22, 1982)).

[225]*Id.*

some circuits where they are admissible as "evidence" rather than as "precedent." In its oft-cited decision in *Xerox Corp. v. United States*,[226] the Court of Claims adopted a district court decision that referred to three private letter rulings.[227] The Court of Claims ruled that the lower court had the right to consider both formal and informal rulings of the Service.[228] After careful consideration, the court held that the Service had adopted the doctrine at issue through its rulings and could not then disavow the doctrine for the sole reason that it produced a good result for the taxpayer in the case.[229]

In *Niles v. United States*,[230] the Ninth Circuit held that letter rulings may be used to demonstrate a "continuous administrative practice."[231] In that case, the Service sought to allocate a portion of a jury award to future medical expenses and then disallow deductions for those expenses.[232] The court found that no statute or case granted the Service authority to make such allocations, and it wrote that the government's attempt to allocate a portion of the jury award to medical expenses changed "an administrative practice almost as old as the income tax itself."[233] The court looked to two private letter rulings as proof of the practice.[234] Likewise, the Sixth Circuit followed suit in *Comerica Bank v. United States*[235] by looking to a private letter ruling for assistance in deciphering the language of a trust.[236]

The Court of Federal Claims took a firmer stance in *Vons Companies, Inc. v. United States*.[237] The taxpayer in that case requested production of background documents related to certain private letter rulings and technical advice memoranda in an effort to show that similarly situated taxpayers had received more favorable treatment.[238] The taxpayer itself had not requested a ruling.[239] The court denied the taxpayer's request by holding that the taxpayer

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[226]656 F.2d 659 (Ct. Cl. 1981).

[227]*See id.* at 660.

[228]*Id.* The lower court based its analysis on four factors common to revenue rulings and private letter rulings cited by the taxpayer. *Id.* at 674. Three of the four factors appeared in both revenue rulings and private letter rulings, but the fourth appeared only in a private letter ruling. *Id.* (citations omitted).

[229]*Id.* at 660.

[230]710 F.2d 1391 (9th Cir. 1983).

[231]*Id.* at 1393.

[232]*Id.* at 1392–93.

[233]*Id.* at 1393.

[234]*See id.* at 1393–94 (looking at I.R.S. Priv. Ltr. Rul. 6207314840A (Jul. 31, 1962) and I.R.S. Priv. Ltr. Rul. 6510284440A (Oct. 28, 1965)). The court held that the Service could not deviate from its usual position, which was firmly entrenched, for the purpose of a single audit. *Id.* at 1393.

[235]93 F.3d 225 (6th Cir. 1996).

[236]*See id.* at 229–30 (looking at I.R.S. Priv. Ltr. Rul. 79-49-21 (Aug. 27, 1979)). The court concluded that the language of both the private letter ruling and the trust supported the taxpayer's argument. *Id.* at 230.

[237]51 Fed. Cl. 1, 8–11 (2001).

[238]*Id.* at 8–9.

[239]*Id.* at 23.

could not demand consistent treatment based on the Service's informal rulings.[240] The court held that informal rulings are relevant for only two purposes: to demonstrate that the Service has an administrative practice of issuing rulings on a given subject, or to demonstrate that the Service has abused its discretion under the *IBM* rule.[241] Because the taxpayer in *Vons* sought recourse to the actual contents of the rulings and their supporting files, the court denied its request for production.[242]

In contrast, a district court in Maryland recently held that field service advice was relevant to a taxpayer's case for purposes of discovery under Federal Rule of Civil Procedure 26.[243] That rule permits discovery of evidence that is "relevant to the claim or defense of any party."[244] The item requested for production "need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[245] In the case at issue, the Service inadvertently produced unredacted field service advice in response to the taxpayer's request.[246] When the court ordered the taxpayer to return the unredacted document, the taxpayer urged the court to reconsider its decision because a portion of the document contained the Service's legal analysis.[247] Although the court did not address whether the field service advice would be admissible at trial for any specific purpose, it noted that the Service's interpretation could be relevant to the penalty portion of the taxpayer's case and that "the great weight of authority" supported use of the Service's informal rulings for nonprecedential purposes.[248] As a result, the court found that discovery of the field service advice was proper under Federal Rule of Civil Procedure 26.[249]

The *Xerox*, *Niles*, *Comerica Bank*, *Vons*, and *Black & Decker* decisions indicate that courts will, in some circumstances, consider as evidence not only the existence of private letter rulings, but also their contents. The *Vons* court, which wrote by far the strictest decision of the five, agreed with its sister courts that taxpayers may submit private letter rulings as evidence of administrative

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[240]*Id.* at 9, 23–24.

[241]*Id.* at 12 (citing Int'l Bus. Mach. Corp. v. United States, 343 F.2d 914, 924 (Ct. Cl. 1965)).

[242]*Id.* at 23–24.

[243]Black & Decker Corp. v. United States, No. Civ.A.WDQ-02-2070, 2004 WL 500847, at *4 (D. Md. Feb. 19, 2004).

[244]FED. R. CIV. P. 26(b)(1).

[245]*Id.*

[246]*Black & Decker*, 2004 WL 500847, at *1.

[247]*Id.* The Service sought exclusion of the legal analysis under Freedom of Information Act exemption 7(A), 5 U.S.C. § 552(b)(7)(A) (2000), which permits nondisclosure of records compiled for law enforcement purposes if their production would interfere with enforcement proceedings. *Black & Decker*, 2004 WL 500847, at *3. The court wrote that it could not imagine how disclosure of the Service's legal analysis of the pertinent statutes and cases could interfere with the government's ability to present its case. *Id.* at *4.

[248]*Id.*

[249]*Id.*

practice.[250] Although the *Vons* court dismissed the idea that consistency could apply to the Service outside of the *IBM* context, it is unclear what relevance an administrative practice would have outside of a claim for consistency. Taken as a whole, the body of decisions discussed above shows that section 6110(k)(3) of the Code should not prevent courts from using private letter rulings as evidence in consistency cases. Furthermore, these cases demonstrate that some courts have already mandated consistency based not only on the existence but also on the contents of private letter rulings.

IV. CONSISTENCY AS IT SHOULD APPLY TO THE SERVICE TOMORROW

It is clear that courts are sometimes willing to impose a duty of administrative consistency on the Service, and that sometimes they are not. The remainder of this Article argues that courts should adopt a broader duty of consistency applicable to the Service. Such a duty already applies to agencies that are called on solely to administer the law.[251] The Service's role as an interpreter as well as an administrator should not place it beyond the reach of the duty of consistency.

A. Reasons for the Taxpayer Duty of Consistency Apply to the Service with Equal Force

The courts and commentators discussed above have forwarded a number of justifications for retaining the taxpayer duty of consistency. Nearly all of them apply to the Service with equal force. The first and most obvious argument in favor of the duty is that it fosters fairness and justice.[252] Most other arguments in its favor are somehow related to this starting point. For instance, one commentator has noted that the duty of consistency buttresses the self-reporting system by reducing the temptation to misrepresent facts and by bolstering public confidence in the fairness of the system.[253] A second argument contends that where the effects of a taxpayer's representation project into future years, the duty of consistency will result in a more accurate application of the tax law by preventing the taxpayer from double-dipping.[254] A third argument in favor of the taxpayer duty of consistency asserts that allowing taxpayers to retract a prior representation would complicate

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[250]*See* Von Companies, Inc. v. United States, 51 Fed. Cl. 1, 12 (2001).

[251]*See* Zelenak, *supra* note 198, at 412–15 (discussing duty of administrative consistency expected of agencies).

[252]*See* Estate of Ashman v. Comm'r, 231 F.3d 541, 544 (9th Cir. 2000) ("[W]e are of the opinion that the duty of consistency not only reflects basic fairness, but also shows a proper regard for the administration of justice and the dignity of the law.").

[253]*See* Johnson, *supra* note 16, at 545.

[254]*See* Alamo Nat'l Bank of San Antonio v. Comm'r, 95 F.2d 622, 623 (5th Cir. 1938); Johnson, *supra* note 16, at 547.

administration by encouraging taxpayers to vacillate.[255] Requiring consistency, then, ensures the finality of past transactions and solidifies their effect on future years.[256]

Stated differently, first, our notion of fair play is offended when a taxpayer benefits from treating a single transaction in two different ways. Second, if we allow taxpayers to change their minds about their transactions after the statute of limitations expires, our already complex system of taxation will become even more complex. Third, without a taxpayer duty of consistency, the government will collect the wrong amount of money from people who inconsistently report related transactions.[257]

The unifying principle at the heart of these arguments is that inconsistent input produces bad output. The fruits of inconsistency are unfair. They injure the public's confidence in the Service, and they result, of necessity, in inaccurate collection of revenue. Finally, they make the tax system more complicated. Because these are bad ends, we should discourage any means used to accomplish them, whether those means are employed by taxpayers or the Service. In other words, it is unfair for the Service to treat a single transaction or identical transactions in two different ways to extract more or less money from a taxpayer than the Code requires. In addition, such inconsistent behavior might discourage taxpayers from seeking the Service's advice, which would increase perceived complexity and actual transaction costs in the form of additional attorneys' fees and tax insurance premiums for taxpayers engaging in complicated transactions.

Failing to allow taxpayer claims against the Service based on inconsistent treatment not only offends our broader notions of fairness and due process; such failure also renders a class of wrongful acts by the Service wholly unreviewable. Where the Service treats two similarly situated taxpayers differently, there is no question that it fails to uphold the revenue laws with respect to one of them. In order to do so, the Service *must* exercise discretion. If that exercise of discretion is permitted by statute, the *IBM* case tells us that the Service must answer to the duty of consistency. If the exercise of discretion is *not* permitted by statute, current case law holds that, absent special circumstances, a taxpayer who is prejudiced by the Service has no recourse.

That answer is clearly wrong. In the first instance, Congress permits the Service to act with discretion. If it abuses its discretion, only one sin is committed—the abuse. In the second instance, Congress has not granted discretion, so two sins are committed—unauthorized use of discretion and the abuse of that discretion. It is nonsensical for courts to review taxpayer

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[255]*See* Sterno Sales Corp. v. United States, 345 F.2d 552, 554 (Ct. Cl. 1965).

[256]*See* Johnson, *supra* note 16, at 546.

[257]That is not to say that the government will necessarily collect the right amount under the duty of consistency. Rather, the government will come closer to collecting the right amount than it would without the duty.

complaints of the first instance but not of the second. As a result, a broad duty of consistency should apply to the Service.

Finally, a strong argument exists that Congress *has* granted discretion to the Service in all instances by failing to provide the Service with resources adequate to its task. A corollary to this argument is that even if the Service's funding were adequate, Congress has granted discretion to the Service by promulgating a set of revenue laws so voluminous as to be humanly unenforceable. Faced with both problems—inadequate funding and excessively complicated laws—the Service's de facto discretion in the prosecution of taxpayers is unavoidable. Courts should acknowledge this discretion rather than turn a blind eye to it. Stated differently, if courts must find some statutory mooring for the duty of consistency, they could look to Congress's appropriations to the Service in comparison to the volume of work annually allocated to it by statute. Then they would be faced with the inescapable conclusion that the Service must choose its battles. It is not too much to ask that those choices be consistent.

B. Arguments against an IRS Duty of Consistency

Regardless of its folk appeal and policy justifications, courts and commentators have forwarded a number of arguments against imposing a full duty of consistency on the Service. All of these arguments ignore the basic question of fairness raised by dissimilar treatment of similar taxpayers. In addition, arguments against the duty of consistency fail to address the bad consequences of inconsistent administration described above. Regardless, these arguments represent a reasoned point of view that should be addressed in an effort to craft an enforceable standard. The following paragraphs describe counterarguments to the Service's duty of consistency and find those arguments unconvincing.

One argument against applying a duty of consistency to the Service is that the Service is not vested with enough discretion to justify use of the duty.[258] This argument focuses on two aspects of discretion. First, it notes that Congress has not granted explicit or implicit statutory discretion to the Service in application of the laws.[259] Second, the argument notes that revenue laws are so detailed that they generally leave little room for creative application.[260] As noted above, practical considerations dictate that the Service actually does have discretion to deviate from the black letter law due to the complexity of

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[258]*See* Zelenak, *supra* note 198, at 411 (observing that Service interprets statutes to vest it with little discretion).

[259]*See generally* Bornstein v. United States, 345 F.2d 558, 562 (Ct. Cl. 1965) (holding employee of Internal Revenue Bureau to be unauthorized to act as agent of United States); Knetch v. United States, 348 F.2d 932, 940 (Ct. Cl. 1965) (holding that taxpayers may not rely on private rulings issued to other individuals).

[260]*See* Zelenak, *supra* note 198, at 411.

that law and the inadequacy of resources allocated to the Service for the enforcement of that law. Even setting those considerations to one side, the sheer size of the Service alone makes consistent enforcement of the law highly unlikely. To the extent that Service employees make inconsistent decisions deliberately or by accident, the Service exercises de facto administrative discretion. As a result, any argument against the duty of consistency based on the Service's lack of discretion must fail.

Another barrier to a duty of consistency applicable to the Service is section 6110(k)(3). One commentator has noted that "[p]rivate letter rulings would seem to be the primary means of demonstrating Service inconsistency because they are numerous, readily obtainable, thoroughly indexed, and represent the Service's considered views on the merits of the questions of law addressed."[261] As a result, section 6110 might be viewed as an impediment to applying a duty of consistency to the Service. Regardless, courts have distinguished precedential use of letter rulings from evidentiary use, as discussed above. Although the line dividing the two seems unclear, the Supreme Court accepted the precedent-versus-evidence dichotomy in its *Hanover Bank* and *Rowan* decisions. As a result, section 6110 should not prevent courts from applying a duty of consistency to the Service with regard to private letter rulings.

A third complaint against application of a broad duty of consistency to the Service is that the duty will reduce tax administration to the "least common denominator."[262] The *Vons* court stated the problem as follows:

> The question of whether a court should impose a duty of consistency on the Service arises when the Service asserts a position against one taxpayer which is justified under the court's interpretation of the relevant provisions of the Internal Revenue Code, but which the Service has not asserted and does not intend to assert against similarly-situated taxpayers. To impose a duty of consistency in those situations is to give taxpayers lenient treatment that is not justified under the substantive law.[263]

In other words, in a nonduty world, if the Service gives a break to one taxpayer but not to others, there is only one infraction of the law. In a duty world, by contrast, if the Service gives a break to one taxpayer, it must then give the same break to all comers, which will result in multiple infractions of the law.

There are two responses to this argument. First, the duty of consistency produces a similar distortion when applied to taxpayers, but in those cases courts eschew proper administration of the law in favor of equitable

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[261] *Id.* at 433–34.

[262] Vons Companies, Inc. v. United States, 51 Fed Cl. 1, 10 n.10 (2001).

[263] Zelenak, *supra* note 198, at 411.

considerations. The same treatment should apply in reverse. Second, holding the Service accountable for its inconsistent acts by allowing all similarly situated taxpayers to benefit from them could deter the Service from showing favoritism or from giving bad ruling advice. For instance, if the Service had known in 1955 that it would be required to give a tax break not only to Remington Rand, but also to its competitor, the Service might have considered the matter more fully before forgoing revenue that it was entitled to collect. As a result, the lowest common denominator argument carries little weight.

There is a third, closely related argument against imposing a broad duty of consistency on the Service. Some opponents of the duty fear that it will have a chilling effect on the Service's ruling and information-sharing functions.[264] While this argument is more persuasive than the first two, it does not outweigh arguments in favor of the duty. Even if the duty of consistency caused the Service to employ a more rigorous process of ruling review, there is no guarantee that increased scrutiny would result in an information bottleneck. Furthermore, if a bottleneck did result, or if the Service simply refused to grant rulings in difficult cases, Congress could step in to correct the problem.

A fourth argument against the duty of consistency is that it would prevent the Service from providing relief to taxpayers with hard-luck cases. This argument is also not persuasive. A taxpayer who faces significant hardship as a result of Service action is differently situated from a taxpayer who will not face hardship. The Code and Treasury Regulations are replete with examples that bear out this assertion.[265] The law clearly expresses Congress's view that hardship is relevant to a taxpayer's interactions with the Service. As a result, there is ample ground for a court to hold that a taxpayer who is facing significant hardship and one who is not are not similarly situated for purposes of applying the duty of consistency.

V. CONCLUSION

The arguments for application of a broader duty of consistency to the Service outweigh the arguments against it. In addition, there is at least some modicum of judicial support for the idea.[266] Finally, our history and sense of

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[264] *See* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 433 (1990).

[265] Section 6163 provides a hardship exception for timely filing of tax returns for remainder or reversionary trust interests. *See* I.R.C. § 6163 (2000). Section 412 provides an exception to minimum plan funding requirements in cases of business hardship. *See id.* § 412(d)(1). Section 3406 provides relief from backup withholding in cases of hardship. *See id.* § 3406(c)(3). Section 6161 provides a hardship exception for timely payment of a deficiency. *See id.* § 6161(b)(1). Finally, the Taxpayer Advocate is authorized to provide assistance and relief in cases of significant hardship or irreparable injury. *See* Internal Revenue Service, U.S. Dep't of Treasury, *Who May Use the Taxpayer Advocate Service?*, http://www.irs.gov/advocate/article/0,,id=97395,00.html (last visited Jan. 22, 2005).

[266] For instance, *IBM*, *Computer Sciences Corp.*, *Alamo National Bank*, *Conway Import Co.*, and *Sirbo*, discussed above, all require consistent actions from the Service. *See* Int'l Bus. Mach. Corp. v. United States, 343 F.2d 914, 920 (Ct. Cl. 1965); Computer Sciences Corp. v.

justice demand it. Courts should require the Service to give similar treatment to similarly situated taxpayers and should accept written rulings as evidence of disparate treatment.[267] Whether a taxpayer is similarly situated to others should depend on facts relevant to the operation of the statute or statutes in question. In addition, courts should acknowledge that taxpayers under significant hardship are not similarly situated to those who are not. Doing so will allow the Service to consider equity in cases where it is necessary. In addition, if a broader duty of consistency is to comport with Supreme Court jurisprudence, the Service must be afforded an opportunity to correct its mistakes. To ensure that those corrections are fair to taxpayers, the Service should make them in the most transparent way possible. Therefore, courts should adopt the rule in *Conway Import Co.*,[268] which would permit taxpayers to use written rulings as evidence of disparate treatment until the Service publishes its change of position in writing.

By adopting the positions above, courts would not only afford taxpayers fair treatment, they would also decrease transaction costs and increase efficiency by making tax results more reliable. For decades, agency rhetoric and court dicta have supported a consistency requirement while actual decisions have suppressed such a result. Applying a broad-based duty of consistency to the Service is not a new idea, but it is one whose time has come. Ample precedent exists for imposition of the duty, and justice demands it.

United States, 50 Fed. Cl. 388, 393 (2001); Alamo Nat'l Bank of San Antonio v. Comm'r, 95 F.2d 622, 623 (5th Cir. 1938); Conway Import Co. v. United States, 311 F. Supp. 5, 14–15 (E.D.N.Y 1969); Sirbo Holdings, Inc. v. Comm'r, 476 F.2d 981, 987 (2d Cir. 1973).

[267]Although not fully explored in this article, at first blush, it seems that the use of other forms of evidence would result in an irreconcilable conflict between the law of estoppel and the duty of consistency. A taxpayer cannot recover in estoppel against the Service if the taxpayer relies, to its detriment, on an unauthorized act or statement of a Service employee made to that taxpayer. *See* Bornstein v. United States, 345 F.2d 558, 562 (Ct. Cl. 1965). Likewise, a similarly situated taxpayer should not be permitted to rely on the same unauthorized statement or action under the duty of consistency. Limiting evidence of disparate treatment to written rulings would prevent such reliance.

[268]*Conway Import Co.*, 311 F. Supp. at 8–15.